No. 17-1471

In The
Supreme Court of the United States

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

GEORGE W. JACKSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF DRI–THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

DRI–The Voice of the Defense Bar (www.dri.org) is an international membership organization composed of more than 22,000 attorneys who defend the interests of businesses and individuals in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers; promoting appreciation for the role of defense lawyers in the civil justice system; anticipating and addressing substantive and procedural issues germane to defense lawyers and fairness in the civil justice system; and preserving the civil jury. To help foster these objectives, DRI participates as *amicus curiae* at both the petition and merits stages in carefully selected Supreme Court cases presenting questions that significantly affect civil defense attorneys, their corporate or individual clients, and the conduct of civil litigation.

Achieving *fairness* in class-action litigation—beginning with the critical need for an impartial court to decide whether a putative class action can proceed beyond the pleadings, and if so, whether a

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* DRI–The Voice of the Defense Bar certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief. As required by Supreme Court Rule 37.2(a), the parties' counsel of record received timely notice of *amicus curiae*'s intent to file this brief. Petitioner's and Respondent's counsel of record have consented to the filing of this brief.

class should be certified—is extraordinarily important to DRI, its members, and their clients. For this reason DRI has filed in this Court a substantial number of *amicus* briefs which present the civil defense bar's views and practical perspective on legal issues that implicate class-action fairness, such as the class-action removal question here. By way of example, DRI's merits-stage *amicus* brief in *Dart Cherokee Basin Operating Co. v. Owens*, No. 13-719 (filed May 29, 2014), argued that there should be no "presumption against removal" under the Class Action Fairness Act ("CAFA")—a position with which the Court agreed. *See Dart Cherokee*, 135 S. Ct. 547, 554 (2014) (holding that "no antiremoval presumption attends cases under CAFA").

Because class-action fairness is fundamental to civil justice, DRI's Center for Law and Public Policy maintains a Class Action Task Force, which monitors major class actions throughout the United States and recommends legislative and judicial reforms. Through the Center, DRI has written to and testified before congressional committees about the compelling need to establish and maintain class-action fairness, including with regard to a defendant's right to remove interstate class actions (i.e., class actions against national or multi-state defendants) from state to federal court. *See, e.g.*, *The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. (2015) (statement of John Parker Sweeney, President, DRI–The Voice of the Defense Bar).

The brazen, recurring, removal-blocking tactic involved in this appeal conflicts with the plain text of CAFA. More fundamentally, in view of many state trial courts' pronounced bias against nationwide and out-of-state corporate defendants, the increasingly utilized anti-removal ploy at issue here is strikingly incompatible with class-action fairness.

CAFA's expanded removal provision, 28 U.S.C. § 1453(b), expressly authorizes "any defendant" to remove a qualifying class action to federal district court. It is intended "to ensure that class actions that are truly interstate in character can be heard in federal court," where "such cases properly belong," and thereby eliminate or mitigate a "parade of abuses" both by "plaintiff-friendly" state courts and class-action plaintiffs' lawyers, who typically enjoy "unbounded leverage" in those courts. S. Rep. No. 109-14, at 5, 6, 20, 27 (2005) ("Senate Report"). As the petition for a writ of certiorari explains, however, four circuits have adopted a rule, based on broad language in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), which enables class-action plaintiffs to easily circumvent § 1453(b).

Under this rule, removal can be avoided or defeated through the expedient of recruiting a defendant in a garden-variety state-court debt-collection action (or other mundane lawsuit) to file a much broader, but only tangentially related, class-action *counterclaim*—not only against the suit's original plaintiff, but also against an *additional, previously uninvolved* defendant, such as Petitioner Home Depot here. The circuits' rule, which embodies a narrow, text-averse interpretation of § 1453(b),

precludes any such additional class-action defendant—not just the original counterclaim defendant (i.e., the plaintiff in the original suit)—from removing the class action. *See Tri-State Water Treatment v. Bauer*, 845 F.3d 350 (7th Cir.), *cert. denied*, 137 S. Ct. 2038 (2017); *Westwood Apex v. Contreras*, 644 F.3d 799 (9th Cir. 2011); *Palisades Collections LLC v. Shorts*, 552 F.3d 327 (4th Cir. 2008). Similarly, although § 1453(b) twice refers to "any defendant," the current rule would preclude a previously uninvolved defendant served with a third-party class-action complaint from removing the case to federal court. *See In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849 (6th Cir. 2012).

DRI defers to Petitioner's sensible, plain-text interpretation of § 1453(b), Pet. at 17-22, and its discussion, *id.* at 10-16, concerning why the Court's nearly 80 year-old opinion in *Shamrock Oil* does not control the CAFA "additional counterclaim defendant" removal question presented by this appeal. Rather than repeating Petitioner's points, this *amicus* brief highlights, from the defense bar's perspective, the reasons why excluding an additional counterclaim defendant (or a third-party defendant) from the right to remove a putative interstate class action under § 1453(b) defeats, rather than promotes, CAFA's objectives.

SUMMARY OF ARGUMENT

Although "[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims . . . there have been abuses of the

class action device that have . . . undermined public respect for our judicial system." 28 U.S.C. § 1711 note (CAFA §§ 2(a)(1) & (2), Pub. L. 109–2) (CAFA Findings & Purposes). Those abuses include "keeping cases of national importance out of Federal court." *Id.* (§ 2(a)(4)(A)). One of the congressionally identified purposes of CAFA, therefore, is "providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." *Id.* (§ 2(b)(2)).

The CAFA removal provision at issue in this appeal, 28 U.S.C. § 1453(b), is intended to ensure that interstate class actions are adjudicated (or settled) in federal court. Section 1453(b) accomplishes this objective by vesting "*any defendant*" (emphasis added) with authority to remove a putative class action over which federal district courts have diversity jurisdiction under § 1332(d)(2).

The purpose of § 1453(b) is defeated if the broad and unequivocal term "any defendant" is interpreted to exclude a defendant that was not previously a party in a peripherally related state-court suit and is served with a class-action counterclaim *rather than* a class-action complaint in a separate suit. Barring such an additional defendant from removing a class-action counterclaim under § 1453(b), even though § 1453(b) authorizes the same defendant to remove a separate class-action complaint containing identical allegations, places form over substance.

This Court's review is needed to prevent forum-shopping plaintiffs' lawyers from evading CAFA removal and forcing national defendants to litigate or

settle class-action claims in plaintiff-friendly state courts. Without the Court's intercession, the state-court class-action abuses that CAFA was enacted to remedy will continue to deprive class-action defendants, and also legitimate class-action plaintiffs themselves, of civil justice.

ARGUMENT

Review is needed because excluding additional class-action counterclaim defendants, and third-party class-action defendants, from the expanded right to remove under § 1453(b) perpetuates state-court abuses that CAFA was enacted to rectify

A. CAFA is intended to facilitate removal of class actions in order to avoid state-court abuses that favor class-action plaintiffs and their lawyers

CAFA's fundamental purposes include "expanding federal jurisdiction over interstate class actions," which "typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit." S. Rep., *supra* at 5; *see Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) ("CAFA's primary objective [is] ensuring 'Federal court consideration of interstate cases of national importance.'") (quoting CAFA § 2(b)(2), Pub. L. No. 109–2, 119 Stat. 5 (2005)); *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 739 (2014) (discussing how CAFA "loosened the requirements for diversity jurisdiction for . . . 'class actions' and 'mass actions'").

Indeed, the detailed Senate Report that accompanied CAFA explains that "[i]nterstate class actions which often involve millions of parties from numerous states—present the precise concerns that diversity jurisdiction was designed to prevent." S. Rep. at 6. By enacting CAFA, "Congress intended the extension of federal jurisdiction over large interstate class actions and liberalization of removal to *further* the proper balance of federalism and 'restore the intent of the framers . . . by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction.'" *Palisades Collections LLC v. Shorts*, 552 F.3d at 342 (Niemeyer, J., dissenting) (quoting CAFA § 2(b)(2)).

The Fourth Circuit observed here that "CAFA, and in particular 28 U.S.C. § 1453(b), was adopted to extend removal authority beyond the traditional rules" in order to "'curb perceived abuses of the class action device which, in the view of CAFA's proponents, had often been used to litigate multi-state or even national class actions in state courts.'" App. 4a-5a (quoting *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 952 (9th Cir. 2009)). The Senate Report explains that CAFA "makes it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction." S. Rep., *supra* at 5; *see id.* at 10 ("*How Diversity Jurisdiction and Removal Statutes Are Abused*"). Defeating removal jurisdiction for interstate class actions would "subvert the intent of the Act." *Id.* at 48.

The Senate Report provides a catalog of class-action abuses "undermining the rights of both plaintiffs and defendants" when plaintiffs' lawyers

are able to "keep nationwide or multi-state class actions in state courts" that flout "basic fairness and due process considerations." *Id.* at 4. For example—

- *"Judicial blackmail forces settlement of frivolous cases."* *Id.* at 20-21.
- *"Lawyers receive disproportionate shares of settlements."* *Id.* at 14-20.
- *"Some magnet state courts easily certify national class actions."* *Id.* at 22-23.
- *"Copy cat class actions clog the courts and permit forum shopping."* *Id.* at 23.

This Court should grant review and hold that the § 1453(b) right-to-remove encompasses class-action counterclaim defendants that were not parties in the original state-court litigation, and also defendants served with third-party class-action complaints. Absent review, class-action plaintiffs' lawyers will be able to continue evading removal of interstate class actions—especially those filed in class-action "magnet" courts—and thereby obstruct the intent of CAFA in general and § 1453(b) in particular.

B. Court of Appeals decisions narrowly construing § 1453(b) fail to take into account CAFA's fundamental objective of achieving fairness by insulating class actions from state-court abuses

The Fourth Circuit opinion affirming remand of this case acknowledges that Congress "expanded removal authority for class actions" in order "to curb perceived abuses" when class actions are litigated in

state courts. App. 4a. But the court's holding that the expansive and unambiguous phrase "any defendant" in § 1453(b) does not really mean what it says ignores that provision's indisputable purpose of removing most class actions from state trial courts, which often are infected with pro-plaintiff, anti-corporation bias.

The court of appeals adhered to its earlier decision in *Palisades Collections*, which "applied *Shamrock Oil* and held that an additional counter-defendant was not 'the defendant or defendants' because it was not a defendant against whom the original plaintiff asserted a claim." App. 6a (quoting *Palisades Collections*, 552 F.3d at 336). *Shamrock Oil*, however, only addressed the authority of an *original* counterclaim defendant (i.e., the plaintiff in the underlying debt-collection suit) to remove a breach-of-contract counterclaim under the 1887 predecessor to the current and substantially similar general removal statute, 28 U.S.C. § 1441(a). In holding that the general removal provision's reference to "the defendant or the defendants" does not encompass an *original* counterclaim defendant, the Court found "of controlling significance . . . the Congressional purpose *to narrow* the federal jurisdiction on removal" in the 1887 general removal provision compared to its more liberal, 1875 predecessor. *Shamrock Oil*, 313 U.S. at 107 (emphasis added).

Shamrock Oil does not involve class action removal: The Court's 1941 holding based on the *narrowing* of the 1887 general removal statute compared to its 1875 predecessor obviously did not

address the "*expanded* removal authority *for class actions*," App. 4a (emphasis added), that Congress established in 2005 through enactment of CAFA. *See Palisades Collections*, 552 F.3d at 344 (Niemeyer, J., dissenting) ("Section 1453(b), by authorizing 'any defendant' to remove, makes *Shamrock Oil* inapplicable in the CAFA context . . . ."); *see also Dart Cherokee*, 135 S. Ct. at 554 ("CAFA's 'provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.'") (quoting S. Rep., *supra* at 43); S. Rep., *supra* at 6 (indicating that "the concept of class actions that are a familiar part of today's legal landscape did not arise until 1966"). Nor does *Shamrock Oil* take into account the congressional intent—the objective of avoiding state-court class-action abuses—underlying CAFA's expansion of class-action removal authority by any defendant.

Neither the panel opinion here, nor the majority opinion in *Palisades Collections*, expresses any concern about the practical consequences of its short-sighted § 1453(b) interpretation: Allowing class-action plaintiffs and their lawyers to dodge removal simply by filing a class-action counterclaim or third-party class-action complaint enables them to continue perpetrating the types of state-court class-action abuses that CAFA was enacted to prevent. The other circuit opinions that have addressed the issue are equally myopic.

Consider the Ninth Circuit majority opinion in *Westwood Apex v. Contreras*, 644 F.3d 799 (2011). According to that opinion, Congress could not have

"intended to modify the original defendant rule" ("limiting the right of removal to original defendants") because "there is no mention of '*Shamrock Oil*' or 'third-party' or 'counterclaim defendant' in the entirety of the Senate Report." *Id.* at 806; *see also In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d at 854 (adopting *Westwood Apex*). Lack of congressional intent should not be inferred, however, merely because the 2005 Senate Report failed to explicitly anticipate the post-CAFA anti-removal gambit at issue in this appeal. Indeed, in his separate opinion in *Westwood Apex*, Judge Bybee explained "[i]t is thus counterintuitive that CAFA does not authorize the removal of this suit . . . the removing parties . . . were forced into state court when [the original defendant] transformed a $ 20,000 debt-collection lawsuit into an unrelated multi-million dollar class action by filing a counterclaim not only against the original plaintiff, but also against the removing parties." *Id.* at 807, 809 (Bybee, J., concurring).

Also consider the Seventh Circuit's 2017 opinion in *Tri-State Water Treatment v. Bauer*, 845 F.3d 350, which like the present case, involves a counterclaim class action against Home Depot. *Tri-State* "began as a simple collection action brought in the Small Claims Court of Madison County, Illinois." *Id.* at 352. The defendant transformed that collection suit into a "multi-state class action" alleging consumer fraud against the original plaintiff and *additional* counterclaim defendants, including Home Depot. *Id.* Home Depot removed the case to federal court under § 1453(b). Affirming the district court's remand, the

court of appeals indicated that although "CAFA made some changes to the removal rules for large, state-law based class actions," keeping the multi-state class action litigation in Madison County, Illinois state court somehow would do the "least damage to . . . litigation efficiency." *Id.* at 354, 355. Oblivious to reality, the court of appeals disagreed with Home Depot's contention that requiring class-action counterclaims to remain in state court "would re-introduce the forum-shopping CAFA was designed to eliminate." *Id.* at 356. According to the court, "state courts have all the tools they need to manage abusive amendments to pleadings." *Id.* at 357.

C. State-court class-action abuses will continue unabated unless this Court grants review and holds that the right to remove under § 1453(b) encompasses additional class-action counterclaim defendants and third-party class-action defendants

Class actions continue to be a major burden on American industry. A recent survey indicates that—

- Class-action spending continues to rise annually. Companies spent $2.24 billion on class actions in 2017.

- The magnitude of class-action exposure and risk also continues to increase.

- Almost 70% of companies face one or more class actions on a continuing basis.

- Consumer fraud claims remain the second most prevalent type of class action.

- Class-action settlement rates have increased to more than 70%.

Carlton Fields Jorden Burt, P.A., *The 2018 Carlton Fields Class Action Survey* 1-2 (2018), https://classactionsurvey.com. The high settlement rate is particularly troubling since as the Senate Report explains, "lawyers, not plaintiffs, may benefit most from settlements . . . the attorneys receive excessive attorneys' fees with little or no recovery for the class members themselves." S. Rep., *supra* at 14.

The fact that class actions continue to proliferate and impose heavy costs and burdens on businesses and industries underscores the need to ensure that all of CAFA's pivotal features are implemented. This includes the expanded class-action removal authority that § 1453(b) expressly confers upon "any defendant." But as the certiorari petition explains, the Fourth, Sixth, Seventh, and Ninth Circuit decisions cabining the scope of § 1453(b) "provide a roadmap for circumventing the clear purpose of the Act." Pet. at 22. In fact, two of those circuits geographically encompass three of what the American Tort Reform Association describes as the nation's worst "judicial hellholes"—California; Madison County, Illinois; and Cook County, Illinois. *See* American Tort Reform Ass'n, *Judicial Hellholes (2017-2018)*, http://www.judicialhellholes.org.

Even worse, the civil defense bar's experience is that the injustice of being forced to litigate (or settle) national class actions in state court rather than federal court is not limited to cases filed in "judicial hellholes." For example—

- Many state courts allow putative class-action plaintiffs to conduct full-blown merits discovery prior to certification.

- Class-certification criteria in many state courts are lenient compared to Federal Rule of Civil Procedure 23(a) standards, or applied flexibly in a manner that usually favors certification.

- Unlike Federal Rule of Civil Procedure 23(f), many state courts do not have a procedure for interlocutory review of class certification.

- Compared to federal courts, state courts are generally reluctant to grant summary judgment or otherwise dismiss a class action prior to trial.

- Many state courts either have not adopted *Daubert*-type standards for admission of expert testimony or liberally allow questionable expert testimony to support certification and/or class-action plaintiffs' claims on the merits.

In sum, as the CAFA Senate Report explains, numerous problems can be attributed to adjudicating class-actions in state courts, "where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over

litigation procedures and proposed settlements." S. Rep., *supra* at 4.

Unjust, and sometimes unprincipled and unscrupulous, certification and adjudication of class-actions by a significant number of state-court judges, whose views (and often allegiance) slant toward the plaintiffs' bar, place national or multi-state "deep pocket" corporate defendants under tremendous pressure to settle even frivolous class-action complaints. *See id.* at 21 ("Not surprisingly, the ability to exercise unbounded leverage over a defendant corporation and the lure of huge attorneys' fees have led to the filing of many frivolous class actions."). In the majority of cases, class certification, especially in state court, sounds the "death knell" of the litigation for the defendants. No matter how unfounded class-action claims or unwarranted class certification may be, the pressure on a defendant to settle a newly certified class action is enormous. *See generally Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1206 (2013) (Scalia, J., dissenting) ("Certification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high."); *id.* at 1212 n.9 (Thomas, J., dissenting) (referring to "*in terrorem* settlement pressures" following class certification).

The level playing field that Congress sought to sow through CAFA cannot be achieved if plaintiffs' lawyers can circumvent § 1453(b) removal simply by tacking a class-action counterclaim against previously uninvolved national defendants onto a

run-of-the-mill debt-collection suit in a carefully chosen state court. Since all four circuits that have addressed the issue believe they are bound by *Shamrock Oil*, only this Court can clarify the scope of that mid-1900s opinion and put today's class-action plaintiffs' bar into its proper place, which is *federal* court.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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